File No. BK 17-01-04509

THE QUEEN'S BENCH
Winnipeg Centre
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE PROPOSAL OF 5274398 MANITOBA LTD.

MOTION BRIEF OF 5274398 MANITOBA LTD.
(Approval Hearing)

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INDEX

PART I LIST OF DOCUMENTS TO BE RELIED UPON

1. Certificate of Filing a Notice of Intention to Make a Proposal, Notice of Intention to Make a Proposal, Consent of Proposal Trustee and List of Creditors, filed August 28, 2017;

2. The Affidavit of Jonathan Doerksen, sworn September 5, 2017 and filed September 5, 2017;

3. The Supplemental Affidavit of Jonathan Doerksen sworn September 6, 2017 and filed September 7, 2017;

4. The Confidential Affidavit of Samantha Dunn, sworn September 6, 2017 and filed September 6, 2017;

5. The First Report of the Proposal Trustee, filed September 6, 2017;

6. Order pronounced September 7, 2017, filed September 12, 2017;

7. Second Report of the Proposal Trustee, filed September 15, 2017;

8. Redacted Affidavit of Samantha Dunn, sworn September 6, 2017 and filed September 13, 2017;

9. Third Report of the Proposal Trustee, filed October 11, 2017;

10. Fourth Report of the Proposal Trustee, filed November 14, 2017;

11. Affidavit of Jonathan Doerksen, sworn November 29, 2017, filed December 1, 2017;

12. Fifth Report of the Proposal Trustee, filed December 4, 2017;

13. Confidential Report of the Proposal Trustee, filed December 5, 2017;

14. Order pronounced December 5, 2017, filed December 5, 2017; and

15. Sixth Report of the Trustee on Proposal dated February 20, 2018, filed February 22, 2018 ("**Sixth Report**").

PART II STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON

Tab

1. *Bankruptcy & Insolvency Act* c. B-3. 1985, c. C-36, as amended ("**BIA**"), ss. 50, 51, 54, 58, 59, 60, 62 and 173;
2. *Magnus One Energy Corp. (Re),* 2009 ABQB 200 ("**Magnus One**"); and
3. *Kitchener Frame Limited (Re),* 2012 ONSC 234 ("**Kitchener Frame**").

PART III LIST OF POINTS TO BE ARGUED

(a) Introduction

1. Lazer Grant Inc. (the "**Proposal Trustee**"), seeks an order approving the proposal (the "**Proposal**") of 5274398 Manitoba Ltd. ("**Cross Country**") dated January 24, 2018 and filed with the Official Receiver pursuant to the BIA. The Proposal is expected to be funded largely from operations and represents a distribution superior to what creditors would be expected to receive on bankruptcy. (*Sixth Report para. 10(b) & Tab A, para. 6.1*)

2. Sections 58 and 59 of the BIA govern when a court may approve a proposal and provide,

> **58.** On acceptance of a proposal by the creditors, the trustee shall
> (a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;
> (b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;
> (c)forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and
> (d) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.
>
> **59 (1)** The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.
>
> **(2)** Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve

the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

(4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

(see Tab 1 - BIA)

(b) Factual Background

3. On August 11, 2017, Cross Country filed a Notice of Intention to Make a Proposal with the Official Receiver under the BIA. The time in which to file a Proposal was extended by way of Orders of this Court granted September 7, 2017, October 11, 2017, November 15, 2017 and December 5, 2017, and the final extension expired on January 19, 2018 at 11:59 p.m. CST.

4. The proposal proceedings were commenced to create an environment within which Cross Country could access working capital financing not otherwise available, to pursue an orderly going concern sale process of its plant in Blenheim, Ontario and certain assets located thereat ("**Blenheim Assets**") to optimize the benefits to stakeholders, with a view to making a viable proposal to creditors and continuing operations from its plant in Morden, Manitoba.

5. This Court further granted Orders in favour of Cross Country:

a. On September 7, 2017, approving of and authorizing, *inter alia*, a sale process for the sale, on a going concern basis, of Blenheim Assets; and

b. on December 5, 2017, approving of and authorizing, *inter alia*, a transaction to conclude the sale of the Blenheim Assets and to vest those assets in the purchaser.

6. On January 19, 2018, prior to the expiration of the final extension, the Proposal Trustee filed the Proposal with the Official Receiver.

7. The Proposal provides for the payment of claims described in s. 60(1), 60(1.1) and 60(1.3) of the BIA, and for the payment of all monies payable under the Proposal to the Proposal Trustee. (*Sixth Report, Tab A*)

8. On January 24, 2018, the Proposal Trustee sent, in the prescribed manner, those documents required to be sent by s. 51 of the BIA to all of the known creditors of Cross Country with claims greater than $250, as well as to the Official Receiver. The documents included a Notice of Proposal to Creditors giving notice of and advising that a creditors meeting would be held on February 6, 2018 at 2:00 P.M. during which time those creditors qualified to vote may, by resolution, vote upon the Proposal (the "**Creditors Meeting**"). (*Sixth Report, Tab B*)

9. The Creditors Meeting was held on February 6, 2018 at 2:00 p.m. and those creditors of Cross Country present either in person or by proxy, whose claims were accepted (the "**Affected Creditors**"**)**, voted unanimously to approve and accept the Proposal satisfying the requirements for deemed acceptance of the creditors provided in s. 54(2)(d) of the BIA. (*Sixth Report, Tab D*)

10. The Proposal Trustee is of the opinion that the Proposal is reasonable and will benefit the creditors of Cross Country generally. The Proposal Trustee is further of the opinion that the Proposal is made in good faith. (*Sixth Report, para 9(d) & 10(c)*).

(c) Cross Country has complied with all statutory requirements, adhered to the previous orders of the court, and not done anything which was not authorized by the BIA or other orders of the court.

11. Cross Country submits that the Proposal Trustee and Cross Country have complied with all statutory requirements:

a. The Proposal provides for the payment of claims as required under the BIA and provides for the payment of all monies payable under the Proposal to the Proposal Trustee;

b. The Proposal was filed with the Official Receiver on January 19, 2018, prior to the expiration of the final extension;

c. Notices were appropriately given and published as to claims and the Creditors Meeting;

d. The Creditors Meeting was held in accordance with the BIA; and

e. The Proposal was approved by the requisite majority in number and two-thirds in value of Affected Creditors.

(d) The Test for Approving a Proposal

12. Pursuant to s. 54(2)(d) of the BIA, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" voting threshold at a duly constituted meeting of creditors.

13. The BIA then requires the proposal trustee to apply to court to approve the proposal. At such hearing, s. 59(2) of the BIA then requires that the court refuse to approve the proposal where its terms are not reasonable or it is not calculated to benefit the general body of creditors.

14. In order to satisfy s. 59(2) test, the courts have held that the following three-pronged test must be satisfied at the approval hearing:

    a. the proposal is reasonable;

    b. the proposal is calculated to benefit the general body of creditors; and

    c. the proposal is made in good faith. *(see Tab 2 - Magnus One para. 10; Tab 3 – Kitchener Frame, para. 19)*

15. The first two factors are set out in s. 59(2) of the BIA while the last factor has been implied by the court as an exercise of its equitable jurisdiction. *(see Tab 3 – Kitchener Frame, para. 20)*

16. With respect to the first part of the test for approving a proposal, the debtor must satisfy the court that the proposal is reasonable and calculated to benefit the general

body of creditors. In so doing the court will consider such matters as the interests of the debtor, the interests of the creditors, the interests of the public at large in the integrity of the bankruptcy system, the payment terms of the proposal and whether the distributions provided for are adequate to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. *(see Tab 2 – Magnus One, para. 11; Tab 3 – Kitchener Frame, para. 20 & 22)*

17. In considering the foregoing courts have also accorded substantial deference to the majority vote of creditors at a meeting of creditors. Similarly, the courts have also accorded deference to the recommendation of the proposal trustee. *(see Tab 2 – Magnus One, para. 11; Tab 3 – Kitchener Frame, para. 21)*

18. Cross Country submits that the Proposal is reasonable, that it benefits the general body of its creditors and meets all other statutory requirements. Cross Country submits that the Proposal is expected to yield a dividend of 19% and that the Affected Creditors will receive far greater recovery under the Proposal than they would in a bankruptcy. It should also be noted that the "related parties" have agreed to forgo their recoveries and will not share in distributions under the Proposal whereas in a bankruptcy such parties would be significant creditors. Further, Cross Country submits that the court should also consider that the Affected Creditors unanimously supported the Proposal and the Proposal Trustee supports the Proposal. As such, Cross Country submits that it has met the test as set out in s. 59(2) of the BIA with respect to approval of the Proposal.

19. With respect to the second part of the test, that the proposal be made in good faith, the debtor must satisfy the court that it has provided full disclosure to its creditors of its assets and encumbrances against such assets. *(see Tab 3 – Kitchener Frame, para. 35)*

20. In the present case, Cross Country has involved the creditors throughout the Proposal proceedings. Further, the Proposal Trustee has prepared and circulated its report to creditors and posted all pleadings in this matter on its website. Finally, the Proposal Trustee is of the view that Cross Country is not subject to censure, has acted in good faith at all of its extension hearings and that Cross Country has made its Proposal is made in good faith.

(e) How should this Honourable Court Exercise its Discretion

21. It is submitted that Cross Country has strictly complied with all statutory requirements and adhered to the previous orders of this Honourable Court in the Proposal proceedings. It is submitted that Cross Country has not done or purported to do anything which was not authorized by either the BIA or an order of this Honourable Court. It is further submitted that the Proposal, as approved at the Meeting of Creditors, is reasonable, calculated to benefit the general body of Cross Country's creditors and was made in good faith. Therefore, Cross Country submits that this Honourable Court

should approve and give effect to the Proposal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of February, 2018

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Bankruptcy & Insolvency Act

(R.S.C., 1985, c. B-3)

(Excerpts)

Who may make a proposal

50 (1) Subject to subsection (1.1), a proposal may be made by

(a) an insolvent person;

(b) a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;

(c) a liquidator of an insolvent person's property;

(d) a bankrupt; and

(e) a trustee of the estate of a bankrupt.

…

To whom proposal made

50 (1.2) A proposal must be made to the creditors generally, either as a mass or separated into classes as provided in the proposal, and may also be made to secured creditors in respect of any class or classes of secured claim, subject to subsection (1.3).

…

Documents to be filed

50 (2) Subject to section 50.4, proceedings for a proposal shall be commenced, in the case of an insolvent person, by filing with a licensed trustee, and in the case of a bankrupt, by filing with the trustee of the estate,

(a) a copy of the proposal in writing setting out the terms of the proposal and the particulars of any securities or sureties proposed, signed by the person making the proposal and the proposed sureties if any; and

(b) the prescribed statement of affairs.

…

Duties of trustee

50 (5) The trustee shall make or cause to be made such an appraisal and investigation of the affairs and property of the debtor as to enable the trustee to estimate with reasonable accuracy the financial situation of the debtor and the cause of the debtor's financial difficulties or insolvency and report the result thereof to the meeting of the creditors.

Trustee to file cash-flow statement

50 (6) The trustee shall, when filing a proposal under subsection 62(1) in respect of an insolvent person, file with the proposal

> **(a)** a statement — or a revised cash-flow statement if a cash-flow statement had previously been filed under subsection 50.4(2) in respect of that insolvent person — (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the person making the proposal, reviewed for its reasonableness by the trustee and signed by the trustee and the person making the proposal;
>
> **(b)** a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
>
> **(c)** a report containing prescribed representations by the person making the proposal regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the person making the proposal.

Creditors may obtain statement

50 (7) Subject to subsection (8), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

…

Trustee to monitor and report

50 (10) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a proposal in respect of an insolvent person shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the proposal until the proposal is approved by the court or the insolvent person becomes bankrupt, and shall

> **(a)** file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at any time that the court may order;

(a.1) send a report about the material adverse change to the creditors without delay after ascertaining the change; and

(b) send, in the prescribed manner, a report on the state of the insolvent person's business and financial affairs — containing the trustee's opinion as to the reasonableness of a decision, if any, to include in a proposal a provision that sections 95 to 101 do not apply in respect of the proposal and containing the prescribed information, if any — to the creditors and the official receiver at least 10 days before the day on which the meeting of creditors referred to in subsection 51(1) is to be held.

…

Claims against directors — compromise

50 (13) A proposal made in respect of a corporation may include in its terms provision for the compromise of claims against directors of the corporation that arose before the commencement of proceedings under this Act and that relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

50 (14) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors arising from contracts with one or more directors; or

(b) are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

50 (15) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be just and equitable in the circumstances.

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

Calling of meeting of creditors

51 (1) The trustee shall call a meeting of the creditors, to be held within twenty-one days after the filing of the proposal with the official receiver under subsection 62(1), by sending in the prescribed manner to every known creditor and to the official receiver, at least ten days before the meeting,

(a) a notice of the date, time and place of the meeting;

(b) a condensed statement of the assets and liabilities;

(c) a list of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books;

(d) a copy of the proposal;

(e) the prescribed forms, in blank, of

(i) proof of claim,

(ii) in the case of a secured creditor to whom the proposal was made, proof of secured claim, and

(iii) proxy, if not already sent; and

(f) a voting letter as prescribed.

In case of a prior meeting

51 (2) Where a meeting of his creditors at which a statement or list of the debtor's assets, liabilities and creditors was presented was held before the trustee is required by this section to convene a meeting to consider the proposal and at the time when the debtor requires the convening of the meeting the condition of the debtor's estate remains substantially the same as at the time of the former meeting, the trustee may omit observance of the provisions of paragraphs (1)(b) and (c).

Chair of first meeting

51 (3) The official receiver, or the nominee thereof, shall be the chair of the meeting referred to in subsection (1) and shall decide any questions or disputes arising at the meeting, and any creditor may appeal any such decision to the court.

Vote on proposal by creditors

54 (1) The creditors may, in accordance with this section, resolve to accept or may refuse the proposal as made or as altered at the meeting or any adjournment thereof.

Voting system

54 (2) For the purpose of subsection (1),

(a) the following creditors with proven claims are entitled to vote:

(i) all unsecured creditors, and

(ii) those secured creditors in respect of whose secured claims the proposal was made;

(b) the creditors shall vote by class, according to the class of their respective claims, and for that purpose

(i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claim, and

(ii) the classes of secured claims shall be determined as provided by subsection 50(1.4);

(c) the votes of the secured creditors do not count for the purpose of this section, but are relevant only for the purpose of subsection 62(2); and

(d) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

Certain Crown claims

54 (2.1) For greater certainty, subsection 224(1.2) of the Income Tax Act shall not be construed as classifying as secured claims, for the purpose of subsection (2), claims of Her Majesty in right of Canada or a province for amounts that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Where no quorum in a class

54 (2.2) Where there is no quorum of secured creditors in respect of a particular class of secured claims, the secured creditors having claims of that class shall be deemed to have voted for the refusal of the proposal.

Related creditor

54 (3) A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

Voting by trustee

54 (4) The trustee, as a creditor, may not vote on the proposal.

…

Application for court approval

58 On acceptance of a proposal by the creditors, the trustee shall

(a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;

(b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;

(c) forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and

(d) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.

Court to hear report of trustee, etc.

59 (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

Court may refuse to approve the proposal

59 (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

Reasonable security

59 (3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

Court may order amendment

59 (4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

Priority of claims

60 (1) No proposal shall be approved by the court that does not provide for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of a debtor and for the payment of all proper fees and expenses of the trustee on and incidental to the proceedings arising out of the proposal or in the bankruptcy.

Certain Crown claims

60 (1.1) Unless Her Majesty consents, no proposal shall be approved by the court that does not provide for the payment in full to Her Majesty in right of Canada or a province, within six months after court approval of the proposal, of all amounts that were outstanding at the time of the filing of the notice of intention or of the proposal, if no notice of intention was filed, and are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or

employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Idem

60 (1.2) No proposal shall be approved by the court if, at the time the court hears the application for approval, Her Majesty in right of Canada or a province satisfies the court that the debtor is in default on any remittance of an amount referred to in subsection (1.1) that became due after the filing

(a) of the notice of intention; or

(b) of the proposal, if no notice of intention was filed.

Proposals by employers

60 (1.3) No proposal in respect of an employer shall be approved by the court unless

(a) it provides for payment to the employees and former employees, immediately after court approval of the proposal, of amounts at least equal to the amounts that they would be qualified to receive under paragraph 136(1)(d) if the employer became bankrupt on the date of the filing of the notice of intention, or proposal if no notice of intention was filed, as well as wages, salaries, commissions or compensation for services rendered after that date and before the court approval of the proposal, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the bankrupt's business during the same period; and

(b) the court is satisfied that the employer can and will make the payments as required under paragraph (a).

Voting on proposal

60 (1.4) For the purpose of voting on any question relating to a proposal in respect of an employer, no person has a claim for an amount referred to in paragraph (1.3)(a).

Proposals by employers — prescribed pension plans

60 (1.5) No proposal in respect of an employer who participates in a prescribed pension plan for the benefit of its employees shall be approved by the court unless

(a) the proposal provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the Pooled Registered Pension Plans Act, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the Pooled Registered Pension Plans Act; and

(b) the court is satisfied that the employer can and will make the payments as required under paragraph (a).

Non-application of subsection (1.5)

60 (1.6) Despite subsection (1.5), the court may approve a proposal that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

60 (1.7) No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Payment to trustee

60 (2) All moneys payable under the proposal shall be paid to the trustee and, after payment of all proper fees and expenses mentioned in subsection (1), shall be distributed by him to the creditors.

Distribution of promissory notes, stock, etc., of debtor

60 (3) Where the proposal provides for the distribution of property in the nature of promissory notes or other evidence of obligations by or on behalf of the debtor or, when the debtor is a corporation, shares in the capital stock of the corporation, the property shall be dealt with in the manner prescribed in subsection (2) as nearly as may be.

Section 147 applies

60 (4) Section 147 applies to all distributions made to the creditors by the trustee pursuant to subsection (2) or (3).

Power of court

60 (5) Subject to subsections (1) to (1.7), the court may either approve or refuse to approve the proposal.

Filing of proposal

62 (1) If a proposal is made in respect of an insolvent person, the trustee shall file with the official receiver a copy of the proposal and the prescribed statement of affairs.

Determination of claims

62 (1.1) Except in respect of claims referred to in subsection 14.06(8), where a proposal is made in respect of an insolvent person, the time with respect to which the claims of creditors shall be determined is the time of the filing of

(a) the notice of intention; or

(b) the proposal, if no notice of intention was filed.

Determination of claims re bankrupt

62 (1.2) Except in respect of claims referred to in subsection 14.06(8), where a proposal is made in respect of a bankrupt, the time with respect to which the claims of creditors shall be determined is the date on which the bankrupt became bankrupt.

On whom approval binding

62 (2) Subject to subsection (2.1), a proposal accepted by the creditors and approved by the court is binding on creditors in respect of

(a) all unsecured claims; and

(b) the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in value of the secured creditors present, or represented by a proxyholder, at the meeting and voting on the resolution to accept the proposal.

When insolvent person is released from debt

62 (2.1) A proposal accepted by the creditors and approved by the court does not release the insolvent person from any particular debt or liability referred to in subsection 178(1) unless the proposal explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability voted for the acceptance of the proposal.

Certain persons not released

62 (3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

Default in performance of proposal

62.1 Where

(a) default is made in the performance of any provision in a proposal,

(b) the default is not waived

(i) by the inspectors, or

(ii) if there are no inspectors, by the creditors, and

(c) the default is not remedied by the insolvent person within the prescribed time,

the trustee shall, within such time and in such form and manner as are prescribed, so inform all the creditors and the official receiver.

Facts for which discharge may be refused, suspended or granted conditionally

173 (1) The facts referred to in section 172 are:

(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

(b) the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by the bankrupt and as sufficiently disclose the business transactions and financial position of the bankrupt within the period beginning on the day that is three years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;

(c) the bankrupt has continued to trade after becoming aware of being insolvent;

(d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;

(e) the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt's business affairs;

(f) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;

(g) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred unjustifiable expense by bringing a frivolous or vexatious action;

(h) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due, given an undue preference to any of the bankrupt's creditors;

(i) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred liabilities in order to make the bankrupt's assets equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities;

(j) the bankrupt has on any previous occasion been bankrupt or made a proposal to creditors;

(k) the bankrupt has been guilty of any fraud or fraudulent breach of trust;

(l) the bankrupt has committed any offence under this Act or any other statute in connection with the bankrupt's property, the bankruptcy or the proceedings thereunder;

(m) the bankrupt has failed to comply with a requirement to pay imposed under section 68;

(n) the bankrupt, if the bankrupt could have made a viable proposal, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness; and

(o) the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

…

Court of Queen's Bench of Alberta

Citation: Magnus One Energy Corp. (Re), 2009 ABQB 200

Date: 20090402
Docket: BE01 080637; BE01 080668
Registry: Calgary

Docket: BE01 080637

In the Matter of the Proposal of
Magnus One Energy Corp.

- and -

Docket: BE01 080668

In the Matter of the Proposal of
Magnus Energy Inc.

Reasons for Judgment
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] Magnus Energy Inc. ("Magnus Energy") and Magnus One Energy Corp. ("Magnus One") apply for approval by the Court of their proposals filed pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 and accepted by the required majority of their creditors. Two creditors, Pedro's Services Ltd. ("Pedro") and Taber Water Disposals Inc. ("Taber"), oppose the application on the basis that Magnus Energy and Magnus One have not acted in good faith and that factors set out under section 173 of the *Bankruptcy and Insolvency Act* can be established against them.

Facts

[2] Magnus Energy and Magnus One were oil and gas exploration and development companies engaged in operations primarily in Alberta and Saskatchewan. Magnus One is a wholly-owned subsidiary of Magnus Energy. They each filed a Notice of Intention to make a

Proposal under the *Bankruptcy and Insolvency Act* on June 18, 2008, naming RSM Richter Inc. as Trustee.

[3] The Magnus companies are no longer operating. Their assets available for distribution to creditors consist of cash on hand and minor accounts receivable. No value has been attributed to any of their undeveloped oil and gas properties.

[4] The parent company of Magnus Energy, Questerre Energy Corporation, holds security over all of the assets of Magnus Energy and Magnus One. As of August 31, 2008, the secured indebtedness owing to Questerre was approximately $4.3 million.

[5] Magnus Energy and Magnus One each filed a Proposal with the Official Receiver on September 5, 2008, and these Proposals were accepted by 91.7% of the creditors of Magnus Energy (22 out of 24 creditors) and 92.3% of the creditors of Magnus One (24 out of 26 creditors). The only creditors who voted against the Proposals were Pedro and Taber, who are controlled by the same principal. Pedro and Taber claim as unsecured creditors of both Magnus Energy and Magnus One pursuant to a default judgment obtained on November 14, 2007 in the amount of $50,557.32.

[6] Under the Proposals, Questerre agrees to be treated as an unsecured creditor for the purpose of most of its claim. Unsecured creditors would receive the lesser of $2,500 and the full amount of their claim plus a pro rata amount of remaining funds.

[7] At the meetings of creditors, the Trustee advised of ongoing discussions with the Energy Resources Conservation Board over abandonment liabilities relating to the wells drilled by the debtors and the priority of such contingent claims over other debts, and advised that Questerre had agreed to deal with such abandonment costs so that any claim by the ERCB would not impact the amount available for distribution under the Proposals. Counsel for Pedro raised the following matters at the meetings:

a) that the Trustee had not obtained a legal opinion on the validity of Questerre's security over the assets of the debtor companies, pointing out that litigation relating to the enforceability and priority of that security as against execution creditors was stayed as a result of the filing of the Notices of Intention. The Trustee responded that a legal opinion on the validity of the security had been obtained by Brookfield and K2, the previous secured creditors that had subsequently been bought out by Questerre, that he was satisfied with such opinion and did not believe that the expense of obtaining a further opinion was justifiable;
b) that the Trustee should closely scrutinize and segregate the debtors' legal costs and Questerre's legal costs as they had the same counsel. The Trustee noted that he did not believe this to be an issue, but agreed to do so; and
c) that counsel understood that more than $3 million of the unsecured debt of the debtors (excluding debt owed to Questerre) had been paid in full since February,

> 2008. The Trustee explained that the $3 million paid to creditors was incurred subsequent to Questerre's acquisition of Magnus Energy's debt, was paid by Questerre and went to the funding of flow-through share obligations. The Trustee was thus satisfied that no creditor had been preferred.

[8] Pedro and Taber's counsel also alleged at the meeting that at the time Magnus One's assets were transferred to Questerre, all of Magnus One's shares were under seizure, and it was their position that a sale could not be authorized and that the transaction was reviewable. The Trustee responded that he was of the view that the seizure of shares would not have prevented the transaction from occurring as Questerre as secured creditor could have affected the transfer of assets through the appointment of a receiver or by seizing the assets.

[9] The Trustee in its report to the Court on this approval application gives the opinion that the Proposals are advantageous for the creditors because they result in a greater distribution to the unsecured creditors, as there would be no distribution to unsecured creditors in a bankruptcy scenario.

Analysis

[10] Prior to approving a Proposal, the Court must be satisfied that:

I) the terms of the Proposal are reasonable,
ii) the terms of the Proposal are calculated to benefit the general body of creditors, and
iii) the Proposal is made in good faith.

[11] The Court must consider, not only the wishes and interests of creditors, but also the conduct and interests of the debtor, the interests of the public and future creditors and the requirements of commercial morality. I am not bound to approve the Proposals even though they have been recommended by the Trustee and given the overwhelming support of creditors, but substantial defence should be afforded to these views: The 2009 *Annotated Bankruptcy and Insolvency Act*, Houlden, Morawetz and Sarra, at page 264, citing *Re Gardner* (1921), 1 C.B.R. 424 (Ont. S.C.); *Re Sumner Co.* (1984) Ltd. (1987), 64 C.B.R. (N.S.) 218 (NB Q.B.) ; *Re Stone* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); Re *National Fruit Exchange Inc*. (1948), 29 C.B.R. 125 (Que. S.C.); *Re Man With Axe Ltd.* (No. 1) (1961), 2 C.B.R. (N.S.) 12 (Man. Q.B.).; Re *Abou-Rached* (2002), 5 C.B.R. (4th) 165, 2002 CarswellBC 1642 (B.C. S.C.).; *Re Garrity* [2006] A.J. No. 890 (Q.B.).

[12] It is not suggested that the formalities of the *Bankruptcy and Insolvency Act*. have not been complied with nor that the Proposals do not have a reasonable possibility of being successfully completed in accordance with their terms.

[13] Pedro and Taber submit that the Proposals should not be approved because the debtor companies have not acted in good faith and that there are facts as set out under section 173 of the *Bankruptcy and Insolvency Act* that can be established against them.

[14] Firstly, these creditors allege that they were not given proper notice of a plan of arrangement involving Magnus Energy and Questerre that received final approval of the Court on October 31, 2007. Pursuant to that plan of arrangement, Magnus Energy shares were transferred to Questerre in return for Questerre shares. The final order provides that the Court is satisfied that service of the application was effected in accordance with the interim order, which required that the application, meeting materials and the interim order be served on Magnus Energy shareholders, its directors and auditors. There was no requirement to serve creditors. The affidavit of the President of Magnus Energy that supported the application for an initial order states that no creditors of Magnus Energy would be adversely affected by the arrangement, as they would continue to hold rights as creditors, and that neither Magnus nor Questerre had entered into the arrangement for the purpose of hindering, delaying or defrauding creditors. Pedro and Taber were thus not entitled to notice of the arrangement, although it appears from comments of their counsel that they were aware of it in any event.

[15] With respect to the arrangement, Pedro and Taber suggest that a press release that gave specific details of the plan of arrangement and the Court approval process was somehow flawed because it referred to the arrangement as a “merger”. This complaint is unfounded, as the press release is quite specific with respect to the arrangement details.

[16] Pedro and Taber also allege that no proper disclosure of the insolvent situation of the Magnus entities was made to the Court at the time the arrangement was approved. However, it is clear from the record that the Court had before it at both the interim and final order stage the Information Circular that was sent to Magnus shareholders that would have included disclosure as mandated by securities regulation, including reference to financial statements that would disclose the details of secured debt.

[17] The principal of Pedro and Taber also states that he is “not aware” if Magnus or Questerre disclosed to the Court the fact that “Questerre intended to assert in due course a security position over other creditors.” It is, however, also clear from the record that it was a condition of the arrangement that all secured debt of Magnus would be paid or satisfied.

[18] The gist of the objection by Pedro and Taber appears to be that Questerre took an assignment of Magnus Energy’s secured debt on October 16, 2007, which they allege resulted in abuse. The specifics of that alleged abuse are as follows:

[19] A. Following the plan of arrangement and assignment of secured debt, in January, 2008, Pedro and Taber registered writs of enforcement against Magnus Energy and Magnus One, and served various garnishee summons from January 17, 2008 to February 21, 2008. On February 12, 2008 Questerre demanded payment of its secured debt and issued a Notice of Intention to Enforce Security to Magnus Energy and Magnus One in the amount of indebtedness then

outstanding, roughly $17 million. Questerre as secured creditor claimed priority over any funds realized by Pedro and Taber through their garnishee summons on the basis that Questerre's security interest had been registered in the Personal Property Registry on December 19, 2007, before Pedro and Taber's writ of enforcement.

[20] Pedro and Taber complain that the question of who was entitled to funds paid into Court pursuant to the garnishees was stayed by the debtors' Notices of Intention. A decision by the debtor companies to exercise their legitimate rights to attempt to resolve their debts through the proposal mechanisms of the *Bankruptcy and Insolvency Act* cannot be considered bad faith.

[21] B. On March 19, 2008, Magnus Energy and Magnus One transferred oil and gas assets to Questerre in partial satisfaction of the roughly $22 million of secured debt that was at that time owed to Questerre. The transfer satisfied debt to the extent of $19.5 million, leaving $2,226.618 owing to Questerre. An independent valuation of the assets was obtained, and the Trustee advised that the property transferred was valued at about $17.5 million by such report. To be conservative, the secured debt was debited at the higher amount of $19.5 million.

[22] On March 18, 2008, as instructed by Pedro and Taber, a bailiff attended at the registered office of the Magnus companies and the offices of counsel for Questerre and left a Notice of Seizure of the shares of Magnus One "pursuant to Section 51 of the *[Securities Transfer Act]* and Section 57 (2) [of an unspecified Act]". Section 57(2) of the *Civil Enforcement Act* provides that an agency may seize "the interest of an enforcement debtor" in a security issued by a private company by serving a notice of seizure on the issuer at its chief executive office. Section 57(4) provides that the interest of an enforcement debtor in a security seized is subject to a prior security interest, the seizure does not affect the prior security interest, and the ability of the agency to deal with the security is limited to those rights and powers that the enforcement debtor would have had but for the seizure. The security held by Questerre over the assets of Magnus Energy appears to extend to all of the property of Magnus Energy, including the shares of Magnus One.

[23] The attempted seizure thus gives rise to a number of issues relating to validity and priority that were not addressed in the submissions made at the hearing before me, but nevertheless, Pedro and Taber submit that the assignment of properties to Questerre can and should be attacked by the Trustee because no approval by the shareholders of Magnus One to a sale of substantially all of the property of the corporation was obtained as required by the *Business Corporation Act*, as Magnus Energy was not in a position to consent to a special resolution authorizing the sale because the shares were under seizure. Even if I was satisfied that the seizure had been validly executed and was unaffected by s. 57(4) of the *Civil Enforcement Act*, the party who would be entitled to raise an objection to the conveyance of assets would be the bailiff, pursuant to section 57.1 of the *Civil Enforcement Act*, and no such objection is in evidence.

C. Pedro and Taber also submit, as they did at the creditor meetings, that the debtors paid roughly 3.5 million to various creditors when other payables were left unpaid, giving rise to

undue preferences. A press release issued by Questerre on November 2, 2007 after the arrangement had been completed indicates that Questerre would be using proceeds of a private placement of securities to fund the flow-through commitments of Magnus, including Magnus' share of drilling costs committed with respect to a particular well.

[24] The Trustee explains that Questerre loaned the money in question to the Magnus companies so that they could meet their flow-through share obligations. He is satisfied that the payments were made in order to preserve an asset of the companies and that only creditors providing new work were paid. He is therefore satisfied that there was no significant undue preference of creditors.

[25] Pedro and Taber submit that the disclosure relating to the Proposals is deficient because they speculate that the reason Questerre is willing to give up its secured creditors status in order to benefit the unsecured creditors is that there must be significant undisclosed tax losses that are of great benefit to Questerre and that the extent of that benefit should be disclosed. The Trustee agrees that there may be some tax losses totalling roughly $2 million, but submits that it is sheer speculation at this time as to whether these losses may be available to Questerre for use in the future. I am satisfied that the issue of the possible use of tax losses is not information so material that it makes the disclosure to creditors or the Court in these applications deficient.

[26] Pedro and Taber also submit that it is obvious that the remaining assets of the Magnus companies are not of a value equal to fifty cents on the dollar on the amount of their unsecured liabilities as set out in s. 173(1)(a) of the *Bankruptcy and Insolvency Act* and that I must thus refuse to approve the Proposals without reasonable security. I am satisfied by the evidence of the conveyance of assets to Questerre to reduce secured debt that this state of affairs has arisen from circumstances for which the Magnus companies cannot justly be held responsible, and therefore, section 173.(1)(a) does not require me to order security. In coming to this determination, I take into account Questerre's agreement to be treated as an unsecured creditor for the remainder of its debt.

[27] I therefore do not find either lack of good faith or proof of facts under section 173 that would preclude the approval of these Proposals. I am satisfied that the terms of the Proposals are reasonable, that they are calculated to benefit the general body of creditors, and that no creditors are being unduly prejudiced. There is nothing in the evidence before me that calls into question the integrity of the process or the requirements of commercial morality. It is persuasive that Questerre is willing to forego the remainder of its secured position and to take on the potentially material contingent claim for reclamation and abondment liabilities in order to allow Proposals with some recovery to the unsecured creditors, and I am persuaded that the situation is substantially better for unsecured creditors than it would be under a general bankruptcy. I therefore approve the Proposals. If the parties wish to make representation with respect to costs, they may do so.

Heard on the 27th day of January, 2009.
Dated at the City of Calgary, Alberta this 2nd day of April, 2009.

B.E. Romaine
J.C.Q.B.A.

Appearances:

John L. Ircandia
Borden Ladner Gervais LLP
for the Applicant

James R. Farrington
Krushel Farrington
for Pedro's Services Ltd. and
Taber Water Disposal Inc.

CITATION: Kitchener Frame Limited (Re), 2012 ONSC 234
COURT FILE NO.: CV-11-9298-00CL
DATE: 20120203

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

RE: **IN THE MATTER OF THE CONSOLIDATED PROPOSAL OF KITCHENER FRAME LIMITED AND THYSSENKRUPP BUDD CANADA, INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **Edward A. Sellers and Jeremy E. Dacks, for the Applicants**

Hugh O'Reilly, Non-Union Representative Counsel

L. N. Gottheil, Union Representative Counsel

John Porter, for Ernst & Young Inc., Proposal Trustee

Michael McGraw, for CIBC Mellon Trust Company

Deborah McPhail, for Financial Services Commission of Ontario

ENDORSEMENT

[1] At the conclusion of this unopposed motion, the requested relief was granted. Counsel indicated that it would be helpful if the court could provide reasons in due course, specifically on the issue of a third-party release in the context of a proposal under Part III of the *Bankruptcy and Insolvency Act* ("*BIA*").

[2] Kitchener Frame Limited ("KFL") and Thyssenkrupp Budd Canada Inc. ("Budd Canada"), and together with KFL, (the "Applicants"), brought this motion for an order (the "Sanction Order") to sanction the amended consolidated proposal involving the Applicants dated August 31, 2011 (the "Consolidated Proposal") pursuant to the provisions of the *BIA*. Relief was also sought authorizing the Applicants and Ernst & Young Inc., in its capacity as proposal trustee

of each of the Applicants (the "Proposal Trustee") to take all steps necessary to implement the Consolidated Proposal in accordance with its terms.

[3] The Applicants submit that the requested relief is reasonable, that it benefits the general body of the Applicants' creditors and meets all other statutory requirements. Further, the Applicants submit that the court should also consider that the voting affected creditors (the "Affected Creditors") unanimously supported the Consolidated Proposal. As such, the Applicants submit that they have met the test as set out in s. 59(2) of the *BIA* with respect to approval of the Consolidated Proposal.

[4] The motion of the Applicants was supported by the Proposal Trustee. The Proposal Trustee filed its report recommending approval of the Consolidated Proposal and indicated that the Consolidated Proposal was in the best interests of the Affected Creditors.

[5] KFL and Budd Canada are inactive entities with no operating assets and no material liquid assets (other than the Escrow Funds). They do have significant and mounting obligations including pension and other non-pension post-employment benefit ("OPEB") obligations to the Applicants' former employees and certain former employees of Budcan Holdings Inc. or the surviving spouses of such former employees or others who may be entitled to claim through such persons in the *BIA* proceedings, including the OPEB creditors.

[6] The background facts with respect to this motion are fully set out in the affidavit of Mr. William E. Aziz, sworn on September 13, 2011.

[7] Affiliates of Budd Canada have provided up to date funding to Budd Canada to enable Budd Canada to fund, on behalf of KFL, such pension and OPEB obligations. However, given that KFL and Budd Canada have no active operations, the *status quo* is unsustainable.

[8] The Applicants have acknowledged that they are insolvent and, in connection with the *BIA* proposal, proceedings were commenced on July 4, 2011.

[9] On July 7, 2011, Wilton-Siegel J. granted Procedural Consolidation Orders in respect of KFL and Budd Canada which authorized the procedural consolidation of the Applicants and permitted them to file a single consolidated proposal to their creditors.

[10] The Orders of Wilton-Siegel J. also appointed separate representative counsel to represent the interests of the Union and Non-Union OPEB creditors and further authorized the Applicants to continue making payments to Blue Cross in respect of the OPEB Claims during the *BIA* proposal proceedings.

[11] On August 2, 2011, an order was granted extending the time to file a proposal to August 19, 2011.

[12] The parties proceeded to negotiate the terms of the Consolidated Proposal, which meetings involved the Applicants, the Proposal Trustee, senior members of the CAW, Union Representative Counsel and Non-Union Representative Counsel.

[13] An agreement in principle was reached which essentially provided for the monetization and compromise of the OPEB claims of the OPEB creditors resulting in a one-time, lump-sum payment to each OPEB creditor term upon implementation of the Consolidated Proposal. The Consolidated Proposal also provides that the Applicants and their affiliates will forego any recoveries on account of their secured and unsecured inter-company claims, which total approximately $120 million. A condition precedent was the payment of sufficient funds to the Pension Fund Trustee such that when such funds are combined with the value of the assets held in the Pension Plans, the Pension Fund Trustee will be able to fully annuitize the Applicants' pension obligations and pay the commuted values to those creditors with pension claims who so elected so as to provide for the satisfaction of the Applicants' pension obligations in full.

[14] On August 19, 2011, the Applicants filed the Consolidated Proposal. Subsequent amendments were made on August 31, 2011 in advance of the creditors' meeting to reflect certain amendments to the proposal.

[15] The creditors' meeting was held on September 1, 2011 and, at the meeting, the Consolidated Proposal, as amended, was accepted by the required majority of creditors. Over 99.9% in number and over 99.8% in dollar value of the Affected Creditors' Class voted to accept the Consolidated Proposal. The Proposal Trustee noted that all creditors voted in favour of the Consolidated Proposal, with the exception of one creditor, Canada Revenue Agency (with 0.1% of the number of votes representing 0.2% of the value of the vote) who attended the meeting but abstained from voting. Therefore, the Consolidated Proposal was unanimously approved by the Affected Creditors. The Applicants thus satisfied the required "double majority" voting threshold required by the *BIA*.

[16] The issue on the motion was whether the court should sanction the Consolidated Proposal, including the substantive consolidation and releases contained therein.

[17] Pursuant to s. 54(2)(d) of the *BIA*, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" voting threshold at a duly constituted meeting of creditors.

[18] The *BIA* requires the proposal trustee to apply to court to sanction the proposal. At such hearing, s. 59(2) of the *BIA* requires that the court refuse to approve the proposal where its terms are not reasonable or not calculated to benefit the general body of creditors.

[19] In order to satisfy s. 59(2) test, the courts have held that the following three-pronged test must be satisfied:

(a) the proposal is reasonable;

(b) the proposal is calculated to benefit the general body of creditors; and

(c) the proposal is made in good faith.

See *Mayer (Re)* (1994), 25 CBR (3d) 113; *Steeves (Re)*, 25 CBR (4th) 317; *Magnus One Energy Corp. (Re)*, 53 CBR (5th) 243.

[20] The first two factors are set out in s. 59(2) of the *BIA* while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors and the interests of the public at large in the integrity of the bankruptcy system. See *Farrell (Re)* 2003, 40 CBR (4th) 53.

[21] The courts have also accorded substantial deference to the majority vote of creditors at a meeting of creditors; see *Lofchik, Re* [1998] O.J. No. 322 (Ont. Bktcy). Similarly, the courts have also accorded deference to the recommendation of the proposal trustee. See *Magnus One, supra*.

[22] With respect to the first branch of the test for sanctioning a proposal, the debtor must satisfy the court that the proposal is reasonable. The court is authorized to only approve proposals which are reasonable and calculated to benefit the general body of creditors. The court should also consider the payment terms of the proposal and whether the distributions provided for are adequate to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. For a discussion on this point, see *Lofchik, supra*, and *Farrell, supra*.

[23] In this case, the Applicants submit that, if the Consolidated Proposal is sanctioned, they would be in a position to satisfy all other conditions precedent to closing on or prior to the date of the proposal ("Proposal Implementation Date").

[24] With respect to the treatment of the Collective Bargaining Agreements, the Applicants and the CAW brought a joint application before the Ontario Labour Relations Board ("OLRB") on an expedited basis seeking the OLRB's consent to an early termination of the Collective Bargaining Agreements. Further, the CAW has agreed to abandon its collective bargaining rights in connection with the Collective Bargaining Agreements.

[25] With respect to the terms and conditions of a Senior Secured Loan Agreement between Budd Canada and TK Finance dated as of December 22, 2010, TK Finance provided a secured creditor facility to the Applicants to fund certain working capital requirements before and during the *BIA* proposal proceedings. As a result of the approval of the Consolidated Proposal at the meeting of creditors, TK Finance agreed to provide additional credit facilities to Budd Canada such that the Applicants would be in a position to pay all amounts required to be paid by or on behalf of the Applicants in connection with the Consolidated Proposal.

[26] On the issue as to whether creditors will receive greater recovery under the Consolidated Proposal than they would receive in the bankruptcy, it is noted that creditors with Pension Claims are unaffected by the Consolidated Proposal. The Consolidated Proposal provides for the satisfaction of Pension Claims in full as a condition precedent to implementation.

[27] With respect to Affected Creditors, the Applicants submit that they will receive far greater recovery from distributions under the Consolidated Proposal than the Affected Creditors

would receive in the event of the bankruptcies of the Applicants. (See Sanction Affidavit of Mr. Aziz at para. 61.)

[28] The Proposal Trustee has stated that the Consolidated Proposal is advantageous to creditors for the reasons outlined in its Report and, in particular:

(a) the recoveries to creditors with claims in respect of OPEBs are considerably greater under the Amended Proposal than in a bankruptcy;

(b) payments under the Amended Proposal are expected in a timely manner shortly after the implementation of the Amended Proposal;

(c) the timing and quantum of distributions pursuant to the Amended Proposal are certain while distributions under a bankruptcy are dependent on the results of litigation, which cannot be predicted with certainty; and

(d) the Pension Plans (as described in the Proposal Trustee's Report) will be fully funded with funds from the Pension Escrow (as described in the Proposal Trustee's Report) and, if necessary, additional funding from an affiliate of the Companies if the funds in the Pension Escrow are not sufficient. In a bankruptcy, the Pension Plans may not be fully funded.

[29] The Applicants take the position that the Consolidated Proposal meets the requirements of commercial morality and maintains the integrity of the bankruptcy system, in light of the superior coverage to be afforded to the Applicants' creditors under the Consolidated Proposal than in the event of bankruptcy.

[30] The Applicants also submit that substantive consolidation inherent in the proposal will not prejudice any of the Affected Creditors and is appropriate in the circumstances. Although not expressly contemplated under the *BIA*, the Applicants submit that the court may look to its incidental, ancillary and auxiliary jurisdiction under s. 183 of the *BIA* and its equitable jurisdiction to grant an order for substantive consolidation. See *Ashley v. Marlow Group Private Portfolio Management Inc*. (2006) 22 CBR (5th) 126 (Ont. S.C.J.) (Commercial List). In deciding whether to grant substantive consolidation, courts have held that it should not be done at the expense of, or possible prejudice of, any particular creditor. See *Ashley, supra*. However, counsel submits that this court should take into account practical business considerations in applying the *BIA*. See *A & F Baillargeon Express Inc. (Trustee of) (Re)* (1993), 27 CBR (3d) 36.

[31] In this case, the Applicants submit that substantive consolidation inherent in the Consolidated Proposal is appropriate in the circumstances due to, among other things, the intertwined nature of the Applicants' assets and liabilities. Each Applicant had substantially the same creditor base and known liabilities (other than certain Excluded Claims). In addition, KFL had no cash or cash equivalents and the Applicants are each dependant on the Escrow Funds and borrowings under the Restated Senior Secured Loan Agreement to fund the same underlying pension and OPEB obligations and costs relating to the Proposal Proceedings.

[32] The Applicants submit that creditors in neither estate will be materially prejudiced by substantive consolidation and based on the fact that no creditor objected to the substantial consolidation, counsel submits the Consolidated Proposal ought to be approved.

[33] With respect to whether the Consolidated Proposal is calculated to benefit the general body of creditors, TK Finance would be entitled to priority distributions out of the estate in a bankruptcy scenario. However, the Applicants and their affiliates have agreed to forego recoveries under the Consolidated Proposal on account of their secured and unsecured inter-company claims in the amount of approximately $120 million, thus enhancing the level of recovery for the Affected Creditors, virtually all of whom are OPEB creditors. It is also noted that TK Finance will be contributing over $35 million to fund the Consolidated Proposal.

[34] On this basis, the Applicants submit that the Consolidated Proposal is calculated to benefit the general body of creditors.

[35] With respect to the requirement of the proposal being made in good faith, the debtor must satisfy the court that it has provided full disclosure to its creditors of its assets and encumbrances against such assets.

[36] In this case, the Applicants and the Proposal Trustee have involved the creditors pursuant to the Representative Counsel Order, and through negotiations with the Union Representative Counsel and Non-Union Representative Counsel.

[37] There is also evidence that the Applicants have widely disseminated information regarding their *BIA* proposal proceedings through the media and through postings on the Proposal Trustee's website. Information packages have also prepared by the Proposal Trustee for the creditors.

[38] Finally, the Proposal Trustee has noted that the Applicants' conduct, both prior to and subsequent to the commencement of the *BIA* proposal proceedings, is not subject to censure in any respect and that the Applicants' have acted in good faith.

[39] There is also evidence that the Consolidated Proposal continues requisite statutory terms. The Consolidated Proposal provides for the payment of preferred claims under s. 136(1) of the *BIA*.

[40] Section 7.1 of the Consolidated Proposal contains a broad release in favour of the Applicants and in favour of certain third parties (the "Release"). In particular, the Release benefits the Proposal Trustee, Martinrea, the CAW, Union Representative Counsel, Non-Union Representative Counsel, Blue Cross, the Escrow Agent, the present and former shareholders and affiliates of the Applicants (including Thyssenkrupp USA, Inc. ("TK USA"), TK Finance, Thyssenkrupp Canada Inc. ("TK Canada") and Thyssenkrupp Budd Company), as well as their subsidiaries, directors, officers, members, partners, employees, auditors, financial advisors, legal counsel and agents of any of these parties and any person liable jointly or derivatively through any or all of the beneficiaries of the of the release (referred to individually as a "Released Party").

[41] The Release covers all Affected Claims, Pension Claims and Escrow Fund Claims existing on or prior to the later of the Proposal Implementation Date and the date on which actions are taken to implement the Consolidated Proposal.

[42] The Release provides that all such claims are released and waived (other than the right to enforce the Applicants' or Proposal Trustee's obligations under the Consolidated Proposal) to the full extent permitted by applicable law. However, nothing in the Consolidated Proposal releases or discharges any Released Party for any criminal or other wilful misconduct or any present or former directors of the Applicants with respect to any matters set out in s. 50(14) of the *BIA*. Unaffected Claims are specifically carved out of the Release.

[43] The Applicants submit that the Release is both permissible under the *BIA* and appropriately granted in the context of the *BIA* proposal proceedings. Further, counsel submits, to the extent that the Release benefits third parties other than the Applicants, the Release is not prohibited by the *BIA* and it satisfies the criteria that has been established in granting third-party releases under the *Companies' Creditors Arrangement Act* ("*CCAA*"). Moreover, counsel submits that the scope of the Release is no broader than necessary to give effect to the purpose of the Consolidated Proposal and the contributions made by the third parties to the success of the Consolidated Proposal.

[44] No creditors or stakeholders objected to the scope of the Release which was fully disclosed in the negotiations, including the fact that the inclusion of the third-party releases was required to be part of the Consolidated Proposal. Counsel advises that the scope of the Release was referred to in the materials sent by the Proposal Trustee to the Affected Creditors prior to the meeting, specifically discussed at the meeting and adopted by the unanimous vote of the voting Affected Creditors.

[45] Counsel also submits that there is no provision in the *BIA* that clearly and expressly precludes the Applicants from including the Release in the Consolidated Proposal as long as the court is satisfied that the Consolidated Proposal is reasonable and for the general benefit of creditors.

[46] In this respect, it seems to me, that the governing statutes should not be technically or stringently interpreted in the insolvency context but, rather, should be interpreted in a manner that is flexible rather than technical and literal, in order to deal with the numerous situations and variations which arise from time to time. Further, taking a technical approach to the interpretation of the *BIA* would defeat the purpose of the legislation. See *NTW Management Group (Re)* (1994), 29 CBR (3d) 139; *Olympia & York Developments Ltd. (Re)* (1995), 34 CBR (3d) 93; *Olympia & York Developments Ltd. (Re)* (1997), 45 CBR (3d) 85.

[47] Moreover, the statutes which deal with the same subject matter are to be interpreted with the presumption of harmony, coherence and consistency. See *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24. This principle militates in favour of adopting an interpretation of the *BIA* that is harmonious, to the greatest extent possible, with the interpretation that has been given to the *CCAA*.

[48] Counsel points out that historically, some case law has taken the position that s. 62(3) of the *BIA* precludes a proposal from containing a release that benefits third parties. Counsel submits that this result is not supported by a plain meaning of s. 62(3) and its interaction with other key sections in the *BIA*.

[49] Subsection 62(3) of the *BIA* reads as follows:

> (3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

[50] Counsel submits that there are two possible interpretations of this subsection:

> (a) It prohibits third party releases – in other words, the phrase "does not release any person" is interpreted to mean "cannot release any person"; or
>
> (b) It simply states that acceptance of a proposal does not automatically release any party other than the debtor – in other words, the phrase "does not release any person" is interpreted to mean "does not release any person without more"; it is protective not prohibitive.

[51] I agree with counsel's submission that the latter interpretation of s. 62(3) of the *BIA* conforms with the grammatical and ordinary sense of the words used. If Parliament had intended that only the debtor could be released, s. 62(3) would have been drafted more simply to say exactly that.

[52] Counsel further submits that the narrow interpretation would be a stringent and inflexible interpretation of the *BIA*, contrary to accepted wisdom that the *BIA* should be interpreted in a flexible, purposive manner.

[53] The *BIA* proposal provisions are designed to offer debtors an opportunity to carry out a going concern or value maximizing restructuring in order to avoid a bankruptcy and related liquidation and that these purposes justify taking a broad, flexible and purposive approach to the interpretation of the relevant provisions. This interpretation is supported by *Ted Leroy Trucking Ltd. (Re)*, 2010 SCC 60.

[54] Further, I agree with counsel's submissions that a more flexible purposive interpretation is in keeping with modern statutory principles and the need to give purposive interpretation to insolvency legislation must start from the proposition that there is no express prohibition in the *BIA* against including third-party releases in a proposal. At most, there are certain limited constraints on the scope of such releases, such as in s. 179 of the *BIA*, and the provision dealing specifically with the release of directors.

[55] In the absence of an express prohibition against including third-party releases in a proposal, counsel submits that it must be presumed that such releases are permitted (subject to compliance with any limited express restrictions, such as in the case of a release of directors). By extension, counsel submits that the court is entitled to approve a proposal containing a third-

party release if the court is able to satisfy itself that the proposal (including the third-party release) is reasonable and for the general benefit for creditors such that all creditors (including the minority who did not vote in favour of the proposal) can be required to forego their claims against parties other than the debtors.

[56] The Applicants also submit that s. 62(3) of the *BIA* can only be properly understood when read together with other key sections of the *BIA*, particularly s. 179 which concerns the effect of an order of discharge:

> 179. An order of discharge does not release a person who at the time of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with the bankrupt, or a person who was surety or in the nature of a surety for the bankrupt.

[57] The order of discharge of a bankrupt has the effect of releasing the bankrupt from all claims provable in bankruptcy (section 178(2) *BIA*). In the absence of s. 179, this release could result in the automatic release at law of certain types of claims that are identified in s. 179. For example, under guarantee law, the discharge of the principal debt results in the automatic discharge of a guarantor. Similarly, counsel points out the settlement or satisfaction of a debt by one joint obligor generally results in the automatic release of both joint obligors. Section 179 therefore serves the limited purpose of altering the result that would incur at law, indicating that the rule that the *BIA* generally is that there is no automatic release of third-party guarantors of co-obligors when a bankrupt is discharged.

[58] Counsel submits that s. 62(3), which confirms that s. 179 applies to a proposal, was clearly intended to fulfil a very limited role – namely, to confirm that there is no automatic release of the specific types of co-obligors identified in s. 179 when a proposal is approved by the creditors and by the court. Counsel submits that it does not go further and preclude the creditors and the court from approving a proposal which contains the third-party release of the types of co-obligors set out in s. 179. I am in agreement with these submissions.

[59] Specific considerations also apply when releasing directors of a debtor company. The *BIA* contains specific limitations on the permissible scope of such releases as set out in s. 50(14). For this reason, there is a specific section in the *BIA* proposal provisions outlining the principles governing such a release. However, counsel argues, the presence of the provisions outlining the circumstances in which a proposal can contain a release of claims against the debtor's directors does not give rise to an inference that the directors are the only third parties that can be released in a proposal. Rather, the inference is that there are considerations applicable to a release or compromise of claims against directors that do not apply generally to other third parties. Hence, it is necessary to deal with this particular type of compromise and release expressly.

[60] I am also in agreement with the alternative submissions made by counsel in this area to the effect that if s. 62(3) of the *BIA* operates as a prohibition it refers only to those limitations that are expressly identified in the *BIA*, such as in s. 179 of the *BIA* and the specific limitations on the scope of releases that can benefit directors of the debtor.

[61] Counsel submits that the Applicants' position regarding the proper interpretation of s. 62(3) of the *BIA* and its place in the scheme of the *BIA* is consistent with the generally accepted principle that a proposal under the *BIA* is a contract. See *Metcalfe & Mansfield Alternative Investments II Corp. (Ltd.)*, 2008 ONSC 587; *Employers' Liability Assurance Corp. v. Ideal Petroleum (1953) Ltd*., [1978] 1 SCR 230; and *Society of Composeurs, Authors & Music Publishers of Canada v. Armitage* (2000), 20 CBR (4th) 160 (C.A.). Consequently, counsel submits that parties are entitled to put anything into a proposal that could lawfully be incorporated into any contract (see *Air Canada (Re)* (2004), 2 CBR (5th) 4) and that given that the prescribed majority creditors have the statutory right under the *BIA* to bind a minority, however, this principle is subject to any limitations that are contained in the express wording of the *BIA*.

[62] On this point, it seems to me, that any provision of the *BIA* which purports to limit the ability of the debtor to contract with its creditors should be clear and explicit. To hold otherwise would result in severely limiting the debtor's ability to contract with its creditors, thereby the decreasing the likelihood that a viable proposal could be reached. This would manifestly defeat the purpose of the proposal provisions of the *BIA*.

[63] The Applicants further submit that creditors' interests – including the interests of the minority creditors who do not vote in favour of a proposal containing a third-party release – are sufficiently protected by the overriding ability of a court to refuse to approve a proposal with an overly broad third-party release, or where the release results in the proposal failing to demonstrate that it is for the benefit of the general body of creditors. The Applicants submit that the application of the *Metcalfe* criteria to the release is a mechanism whereby this court can assure itself that these preconditions to approve the Consolidated Proposal contained in the Release have been satisfied.

[64] The Applicants acknowledge that there are several cases in which courts have held that a *BIA* proposal that includes a third-party release cannot be approved by the court but submits that these cases are based on a mistaken premise, are readily distinguishable and do not reflect the modern approach to Canadian insolvency law. Further, they submit that none of these cases are binding on this court and should not be followed.

[65] In *Kern Agencies Ltd. (No. 2) (Re)* (1931), 13 CBR 11, the court refused to approve a proposal that contained a release of the debtor's directors, officers and employees. Counsel points out that the court's refusal was based on a provision of the predecessor to the *BIA* which specifically provided that a proposal could only be binding on creditors (as far as relates to any debts due to them from the debtor). The current *BIA* does not contain equivalent general language. This case is clearly distinguishable.

[66] In *Mister C's Ltd. (Re)*, (1995) 32 CBR (3d) 242, the court refused to approve a proposal that had received creditor approval. The court cited numerous bases for its conclusion that the proposal was not reasonable or calculated to benefit the general body of creditors, one of which was the release of the principals of the debtor company. The scope of the release was only one of the issues with the proposal, which had additional significant issues (procedural irregularities,

favourable terms for insiders, and inequitable treatment of creditors generally). I agree with counsel to the Applicants that this case can be distinguished.

[67] *Re Cosmic Adventures Halifax Inc*. (1999) 13 CBR (4th) 22 relies on *Kern* and furthermore the Applicants submit that the discussion of third-party releases is technically *obiter* because the proposal was amended on consent.

[68] The fourth case is *C.F.G. Construction Inc. (Re),* 2010 CarswellQue 10226 where the Quebec Superior Court refused to approve a proposal containing a release of two sureties of the debtor. The case was decided on alternate grounds – either that the *BIA* did not permit a release of sureties, or in any event, the release could not be justified on the facts. I agree with the Applicants that this case is distinguishable. The case deals with the release of sureties and does not stand for any broader proposition.

[69] In general, the Applicants' submission on this issue is that the court should apply the decision of the Court of Appeal for Ontario in *Metcalfe*, together with the binding principle set out by the Supreme Court in *Ted Leroy Trucking*, dictating a more liberal approach to the permissibility of third-party releases in *BIA* proposals than is taken by the Quebec court in *C.F.G. Construction Inc*. I agree.

[70] The object of proposals under the *BIA* is to permit the debtor to restructure its business and, where possible, avoid the social and economic costs of liquidating its assets, which is precisely the same purpose as the *CCAA*. Although there are some differences between the two regimes and the *BIA* can generally be characterized as more "rules based", the thrust of the case law and the legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible, encouraging reorganization over liquidation. See *Ted Leroy Trucking*.

[71] Recent case law has indicated that, in appropriate circumstances, third-party releases can be included in a plan of compromise and arrangement that is approved under the *CCAA*. See *Metcalfe*. The *CCAA* does not contain any express provisions permitting such third-party releases apart from certain limitations that apply to the compromise of claims against directors of the debtor company. See *CCAA* s. 5.1 and *Allen-Vanguard Corporation (Re),* 2011 ONSC 733.

[72] Counsel submits that although the mechanisms for dealing with the release of sureties and similar claimants are somewhat different in the *BIA* and *CCAA*, the differences are not of such significance that the presence of s. 62(3) of the *BIA* should be viewed as dictating a different approach to third-party releases generally from the approach that applies under the *CCAA*. I agree with this submission.

[73] I also accept that if s. 62(3) of the *BIA* is interpreted as a prohibition against including the third-party release in the *BIA* proposal, the *BIA* and the *CCAA* would be in clear disharmony on this point. An interpretation of the *BIA* which leads to a result that is different from the *CCAA* should only be adopted pursuant to clear statutory language which, in my view, is not present in the *BIA*.

[74] The most recent and persuasive example of the application of such a harmonious approach to the interpretation of the *BIA* and the *CCAA* can be found in *Ted Leroy Trucking*.

[75] At issue in *Ted Leroy Trucking* was how to resolve an apparent conflict between the deemed trust provisions of the *Excise Tax Act* and the provisions of the *CCAA*. The language of the *Excise Tax Act* created a deemed trust over GST amounts collected by the debtor that was stated to apply "despite any other Act of Parliament". The *CCAA* stated that the deemed trust for GST did not apply under the *CCAA*, unless the funds otherwise specified the criteria for a "true" trust. The court was required to determine which federal provision should prevail.

[76] By contrast, the same issue did not arise under the *BIA*, due to the language in the *Excise Tax Act* specifically indicating that the continued existence of the deemed trust depended on the terms of the *BIA*. The *BIA* contained a similar provision to the *CCAA* indicating that the deemed trust for GST amounts would no longer apply in a *BIA* proceeding.

[77] Deschamps J., on behalf of six other members of the court, with Fish J. concurring and Abella J. dissenting, held that the proper interpretation of the statutes was that the *CCAA* provision should prevail, the deemed trust under the *Excise Tax Act* would cease to exist in a *CCAA* proceeding. In resolving the conflict between the *Excise Tax Act* and the *CCAA*, Deschamps J. noted the strange asymmetry which would arise if the *BIA* and *CCAA* were not in harmony on this issue:

> Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

[78] It seems to me that these principles indicate that the court should generally strive, where the language of both statutes can support it, to give both statutes a harmonious interpretation to avoid the ills that can arise from "statute-shopping". These considerations, counsel submits, militate against adopting a strained reading of s. 62(3) of the *BIA* as a prohibition against third-party releases in a *BIA* proposal. I agree. In my opinion, there is no principled basis on which the analysis and treatment of a third-party release in a *BIA* proposal proceeding should differ from a CCAA proceeding.

[79] The Applicants submit that it logically follows that the court is entitled to approve the Consolidated Proposal, including the Release, on the basis that it is reasonable and calculated to

benefit the general body of creditors. Further, in keeping with the principles of harmonious interpretation of the *BIA* and the *CCAA*, the court should satisfy itself that the *Metcalfe* criteria, which apply to the approval of a third-party release under the CCAA, has been satisfied in relation to the Release.

[80] In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify a third-party release are:

(a) the parties to be released are necessary and essential to the restructuring of the debtor;

(b) the claims to be released are rationally related to the purpose of the Plan (Proposal) and necessary for it;

(c) the Plan (Proposal) cannot succeed without the releases;

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan (Proposal); and

(e) the Plan (Proposal) will benefit not only the debtor companies but creditors generally.

[81] These requirements have also been referenced in *Canwest Global Communications Corp. (Re)*, 70 CBR (5th) 1 and *Angiotech Pharmaceuticals Inc. (Re)* 76 CBR (5th) 210.

[82] No single requirement listed above is determinative and the analysis must take into account the facts particular to each claim.

[83] The Applicants submit that the Release satisfies each of the *Metcalfe* criteria. Firstly, counsel submits that following the closing of the Asset Purchase Agreement in 2006, Budd Canada had no operating assets or income and relied on inter-company advances to fund the pension and OPEB requirements to be made by Budd Canada on behalf of KFL pursuant to the Asset Purchase Agreement. Such funded amounts total approximately $112.7 million in pension payments and $24.6 million in OPEB payments between the closing of the Asset Purchase Agreement and the Filing Date. In addition, TK Finance has been providing Budd Canada and KFL with the necessary funding to pay the professional and other costs associated with the *BIA* Proposal Proceedings and will continue to fund such amounts through the Proposal Implementation Date. Moreover, TK Canada and TK Finance have agreed to forego recoveries under the Consolidated Proposal on account of their existing secured and unsecured inter-company loans in the amount of approximately $120 million.

[84] Counsel submits that the releases provided in respect of the Applicants' affiliates are the *quid pro quo* for the sacrifices made by such affiliates to significantly enlarge recoveries for the unsecured creditors of the Applicants, particularly the OPEB creditors and reflects that the affiliates have provided over $135 million over the last five years in respect of the pension and OPEB amounts and additional availability of approximately $49 million to allow the Applicants to discharge their obligations to their former employees and retirees. Without the Releases,

counsel submits, the Applicants' affiliates would have little or no incentive to contribute funds to the Consolidated Proposal and to waive their own rights against the Applicants.

[85] The Release in favour of Martinrea is fully discussed at paragraphs 121-127 of the factum. The Applicants submit that the third-party releases set out in the Consolidated Proposal are clearly rationally related, necessary and essential to the Consolidated Proposal and are not overly broad.

[86] Having reviewed the submissions in detail, I am in agreement that the Released Parties are contributing in a tangible and realistic way to the Consolidated Proposal.

[87] I am also satisfied that without the Applicants' commitment to include the Release in the Consolidated Proposal to protect the Released Parties, it is unlikely that certain of such parties would have been prepared to support the Consolidated Proposal. The releases provided in respect of the Applicants' affiliates are particularly significant in this regard, since the sacrifices and monetary contributions of such affiliates are the primary reason that the Applicants have been able to make the Consolidated Proposal. Further, I am also satisfied that without the Release, the Applicants would be unable to satisfy the borrowing conditions under the Amended and Restated Senior Secured Loan Agreement with respect to the Applicants having only certain permitted liabilities after the Proposal Implementation Date. The alternative for the Applicants is bankruptcy, a scenario in which their affiliates' claims aggregating approximately $120 million would significantly erode recoveries for the unsecured creditors of the Applicants.

[88] I am also satisfied that the Releases benefit the Applicants and creditors generally. The primary non-affiliated Creditors of the Applicants are the OPEB Creditors and Creditors with Pension Claims, together with the CRA. The Consolidated Proposal, in my view, clearly benefits these Creditors by generating higher recoveries than could be obtained from the bankruptcies of the Applicants. Moreover, the timing of any such bankruptcy recoveries is uncertain. As noted by the Proposal Trustee, the amount that the Affected Creditors would receive in the event of the bankruptcies of the Applicants is uncertain both in terms of quantum and timing, with the Applicants' funding of OPEB Claims terminating on bankruptcy, but distributions to the OPEB Creditors and other Creditors delayed for at least a year or two but perhaps much longer.

[89] The Applicants and their affiliates also benefit from the Release as an affiliate of the Applicants may become enabled to use the net operating losses (NOL) following a series of transactions that are expected to occur immediately following the Proposal Implementation Date.

[90] I am also satisfied that the Applicants have provided full and adequate disclosure of the Releases and their effect. Full disclosure was made in the proposal term sheet circulated to both Representative Counsel in early August 2011. The Release was negotiated as part of the Consolidated Proposal and the scope of the Release was disclosed by the Proposal Trustee in its Report to the creditors on the terms of the Consolidated Proposal, which Report was circulated by the Proposal Trustee to the Applicants' known creditors in advance of the creditors' meeting.

[91] I am satisfied that the Applicants, with the assistance of the Proposal Trustee, took appropriate steps to ensure that the Affected Creditors were aware of the existence of the release provisions prior to the creditors' meeting.

[92] For the foregoing reasons, I have concluded that the Release contained in the Consolidated Proposal meets the *Metcalfe* criteria and should be approved.

[93] In the result, I am satisfied that the section 59(2) *BIA* test has been met and that it is appropriate to grant the Sanction Order in the form of the draft order attached to the Motion Record. An order has been signed to give effect to the foregoing.

MORAWETZ J.

Date: February 3, 2012